UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v.- : 08 Cr. 972 (DAB)

ANTHONY CUTI and
WILLIAM TENNANT, :

Defendants. :

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GOVERNMENT'S REQUESTS TO CHARGE

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GOVERNMENT'S REQUESTS TO CHARGE

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, the Government respectfully requests the Court to include the following in its charge to the jury.

REQUEST NO. 1

General Requests

The Government respectfully requests that the Court give its usual instructions to the jury on the following matters:

a. Function Of Court And Jury.

b. Indictment Not Evidence.

c. Statements Of Court And Counsel Not Evidence.

d. Burden Of Proof And Presumption Of Innocence.

e. Reasonable Doubt.

f. Government Treated Like Any Other Party.

g. Definitions, Explanations And Example Of Direct And Circumstantial Evidence.

h. Credibility Of Witnesses.

i. Right To See Exhibits And Have Testimony Read During Deliberations.

j. Sympathy: Oath Of Jurors.

k. Punishment Is Not To Be Considered By The Jury.

l. Verdict Of Guilt Or Innocence Must Be Unanimous.

m. Stipulations.

REQUEST NO. 2

The Indictment

The defendants ANTHONY CUTI and WILLIAM TENNANT are formally charged in an Indictment. As I instructed you at the outset of this case, the Indictment is simply a charge or accusation, it is not evidence.

The Indictment in this case contains five separate counts. Defendant ANTHONY CUTI is charged in all five counts; defendant WILLIAM TENNANT is charged in two of those counts. You will be called upon to render a separate verdict with respect to each count and with respect to each defendant.

Count One of the Indictment charges ANTHONY CUTI and WILLIAM TENNANT with participating in a criminal conspiracy. It alleges that this conspiracy had four different objectives: (1) to commit securities fraud; (2) to make and cause to be made false and misleading statements in annual and quarterly reports filed with the United States Securities and Exchange Commission ("SEC"); (3) to make and cause to be made false and misleading statements to accountants in connection with audits and examinations of financial statements of a public company; and (4) to falsify the books and records of a public company.

As I will explain in more detail in a few moments, a conspiracy, such as the one charged in Count One, is a criminal agreement to violate the law. The other charges in the

Indictment, which are set forth in Counts Two through Five, allege what are called "substantive" violations. Unlike the conspiracy charge, which is a charge of agreeing to commit offenses, the substantive counts are based on the actual commission of offenses.

I will give you more in-depth instructions on the substantive violations later in this charge. For now, I simply want to describe the Indictment generally. The substantive charges in the indictment are as follows: Count Two of the Indictment charges both defendants with committing securities fraud; and Counts Three through Five charge defendant ANTHONY CUTI with making and causing to made false and misleading statements in filings with the SEC.

As you may have noticed, each of the crimes charged as a substantive offense in Counts Two through Five is also charged as one of the objectives of the conspiracy charged in Count One.

REQUEST NO. 3

Conspiracy and Substantive Counts

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the objective, also known as the "object" of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding to violate other laws or to defraud the United States. Thus, if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge there is no need to prove that the crime or crimes that were the objects of the conspiracy were actually committed.

Of course, if a defendant participates in a conspiracy and the crime or crimes which were the object of the conspiracy were committed, the defendant may be guilty of both the conspiracy and the substantive crime, as I will instruct you shortly. The point simply is that the crime or crimes that were the object of the conspiracy need not have been actually committed for a conspiracy to exist.

Adapted from Judge Jones's charge in
United States v. Weissman,
01 Cr. 529 (BSJ).

REQUEST NO. 4

Count One: Conspiracy -- General Instructions

Now let us turn to the conspiracy charge itself.

The first count of the Indictment charges that the defendants ANTHONY CUTI and WILLIAM TENNANT violated Section 371 of Title 18 of the United States Code. That section provides in relevant part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each. . ." is guilty of a crime.

As I've already mentioned, the defendants are charged in this count with participating in a conspiracy to violate several federal statutes. Specifically, Count One charges that:

> [The Court is respectfully requested to read or summarize Count One of the Indictment, excluding the overt acts]

The Indictment also lists the overt acts that are alleged to have been committed in furtherance of the conspiracy.

A conspiracy is a kind of criminal partnership – a combination or agreement of two or more persons to join together to accomplish some unlawful purpose.

As I have noted, the crime of conspiracy to violate a federal law, as charged in this Indictment, is an independent offense. It is separate and distinct from the actual violation of any specific federal laws.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 5

Count One: Conspiracy – Elements of Conspiracy

Now, to sustain its burden of proof with respect to the allegation of conspiracy, the Government must separately prove beyond a reasonable doubt the following three elements:

First, that the conspiracy charged existed -- that is, the existence of an agreement or understanding to commit at least one of the object crimes charged in the Indictment;

Second, that the defendant you are considering knowingly became a member of the conspiracy; and

Third, that any one of the conspirators -- not necessarily the defendant you are considering, but any one of the parties involved in the conspiracy -- knowingly committed at least one overt act in furtherance of the conspiracy during the life of the conspiracy.

Now let us separately consider the three elements: first, the existence of the conspiracy; second, whether the defendant you are considering knowingly associated himself with and participated in the conspiracy; and third, whether an overt act was committed in furtherance of the conspiracy.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 6

Count One: Conspiracy -- First Element -- Existence of the Conspiracy

Starting with the first element, what is a conspiracy? A conspiracy is a combination, an agreement, or an understanding of two or more persons to accomplish by concerted action a criminal or unlawful purpose.

The gist, or the essence, of the crime of conspiracy is the unlawful combination or agreement to violate the law. The success of the conspiracy, or the actual commission of the criminal act which is the object of the conspiracy, is not an essential element of that crime.

The conspiracy alleged here is therefore the agreement to commit the crimes, and it is an entirely distinct and separate offense from the actual commission of the crime.

Now, to show a conspiracy, the Government is not required to show that two or more people sat around a table and entered into a solemn pact, orally or in writing, stating that they had formed a conspiracy to violate the law and spelling out all the details. Common sense tells you that when people, in fact, agree to enter into a criminal conspiracy, much is left to the unexpressed understanding. It is rare that a conspiracy can be proven by direct evidence of an explicit agreement.

To show that a conspiracy existed, the evidence must show that two or more persons, in some way or manner, through any contrivance, explicitly or implicitly came to an understanding to violate the law and to accomplish an unlawful plan.

In determining whether there has been an unlawful agreement as alleged, you may consider acts and the conduct of the alleged co-conspirators that were done to carry out the apparent criminal purpose. The old adage, "Actions speak louder than words," applies here. Often, the only evidence that is available with respect to the existence of a conspiracy is that of disconnected acts and conduct on the part of the alleged individual co-conspirators. When taken all together and considered as a whole, however, those acts and conduct may warrant the inference that a conspiracy existed as conclusively as would direct proof.

So, you must first determine whether or not the proof established beyond a reasonable doubt the existence of the conspiracy charged in the Indictment. In considering this first element, you should consider all the evidence which has been admitted with respect to the conduct and statements of each alleged co-conspirator and such inferences as may be reasonably drawn from them. It is sufficient to establish the existence of the conspiracy, as I've already said, if, from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding way to accomplish, by the means alleged, at least one object of the conspiracy.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 7

Count One: Conspiracy -- Objects of the Conspiracy

The objects of a conspiracy are the illegal goals the co-conspirators agree or hope to achieve. As I've mentioned, the Indictment here charges the following objects of the conspiracy: (1) to commit securities fraud; (2) to make and cause to be made false and misleading statements in annual and quarterly reports filed with the SEC; (3) to make and cause to be made false and misleading statements to accountants in connection with audits and examinations of financial statements of a public company; and (4) to falsify the books and records of a public company.

I will now review with you each of these objects. In considering the objects, however, you should keep in mind that you need not find that the conspirators agreed to accomplish each one of these objects. An agreement to accomplish any one of the three objects is sufficient. If the Government fails to prove that at least one of the objects was an objective of the conspiracy, then you must find the defendant not guilty on the conspiracy count you are considering.

However, if you find that the conspirators agreed to accomplish any one of the four charged objects, the illegal purpose element will be satisfied.

Object 1: Securities Fraud

The first crime alleged to be an object of the conspiracy charged in Count One is securities fraud. Because securities fraud is not only charged as an object of the conspiracy but as a separate substantive offense, I will be giving you further instructions about it later on. For now, it suffices to say that the federal laws that are relevant here make it a crime, in connection with the purchase or sale of securities, to do any one of the following three things.

The first is to employ a device, scheme or artifice to defraud. A device, scheme or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term which embraces all efforts and means that individuals devise to take advantage of others. It includes all kinds of manipulative and deceptive acts.

The second thing made unlawful by the securities fraud statute is to make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

The third thing made unlawful by the securities fraud statute is to engage in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller of securities.

If you find that two or more persons agreed that any one of these things be done, then ths securities fraud objective would be proved.

I have also used the word "material" in describing the nature of the false or misleading statements. We use the word "material" to distinguish between the kinds of statements we care about and those that are of no real importance. Matters that are "material" may also include fraudulent half-truths or omissions of material fact. A material fact is one that a reasonable person or entity might have considered important in making an investment decision. That means if you find a particular statement of fact or omission to have been untruthful or misleading, before you can find that statement or omission to be material, you must also find that the statement or omission was one that would have mattered to a reasonable person or entity in making such an investment decision.

Object 2: False Or Misleading Statements In Financial Statements

The second crime alleged to be an object of the conspiracy charged in Count One is making, or causing to be made, false statements in applications, reports, and documents required to be filed under the Securities Exchange Act of 1934. Because this object is also charged as a separate substantive offense, I will be giving you further instructions about it later on. For now, it suffices to say that public companies are required to file certain financial statements with the SEC. To prove this object for purposes of the conspiracy count, the Government must prove that two or more persons agreed to make, or caused to be made, a materially false or misleading statement in one such financial statement. I have already discussed with you the concepts of materiality and falsity, and I won't repeat that here.

Object 3: Making False Or Misleading Statements to Auditors

The third object charged in Count One is making, or causing to be made, materially false and misleading statements to Duane Reade's auditors. The law prohibits directors or officers of a corporation that has publicly traded securities from making or causing to be made false or misleading statements to an accountant either in connection with an audit or examination of the company's financial statements or in connection with the preparation and filing of documents with the SEC.

To establish this object, the Government must prove that two or more persons agreed that the directors or officers of a public company would, directly or indirectly, make or cause to be made a materially false or misleading statement; or that those officers or directors would, directly or indirectly, omit to state, or cause another person to omit to state, a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading. Such material false statements or omissions must be made to an accountant in connection with (1) an audit or examination of the financial statements of the company, or (2) the preparation or filing of any document or report required to be filed with the SEC.

I have already described for you the concepts of falsity and materiality, and have explained that a public company is required to file financial statements with the SEC. You should apply those same instructions here.

Adapted from the charge of the Honorable Barbara S. Jones in United States v. Weissman, 01 Cr. 529 (BSJ)

Object 4: Falsification of the Books and Records of a Public Company

The fourth crime alleged to be an object of the conspiracy charged in Count One is falsifying, or causing the falsification of, the books and records of a public company, here, Duane Reade.

Federal law mandates that public companies are required to file documents and reports as prescribed by the SEC. These include annual reports on Form 10-K and quarterly reports on Form 10-Q. Public companies that are required to file reports containing financial statements with the SEC must also "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." (Section 13(b)(2)(A) of the Securities Exchange Act of 1934, Title 15, United States Code, Section 78m(b)(2)(A)).

Federal law also provides that "No person shall directly or indirectly, falsify or cause to by falsified, any book, record or account" that is required to be made or kept. (Section 13(b)(5) of the Securities Exchange Act of 1934, Title 15, United States Code, Section 78m(b)(5); Rule 13b2-1, Title 17, Code of Federal Regulations, Section 240.13b2-1).

To prove this object the Government must show, first, that Duane Reade was required to file reports under federal law. I have already instructed you that public companies are required to file financial statements with the SEC. Again, if you find the Government has proved that Duane Reade was a public company, this would mean that it was required to file financial statements. It would also mean that Duane Reade was required to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflected their financial transactions.

The term "records" means "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language." (Section 3(37) of the Securities Exchange Act of 1934, Title 15, United States Code, Section

78(c)(37)). Such records include, for example, income statements, balance sheets, general ledgers, journals, and account records.

> Adapted from Judge Koeltl's charge in United States v. Jeffrey Szur, et al., 97 Cr. 108 (JGK); Judge Lowe's charge in United States v. GAF Corporation, 88 Cr. 415 (MJL); and Judge Stanton's charge in United States v. Nicholas Rudi, 95 Cr. 166 (LLS).

Second, the Government must show that two or more persons agreed that a member of the conspiracy would falsify, or cause another person to falsify, the books, records, or accounts of Duane Reade or cause those books, records, or accounts to be falsified.

> Adapted from the charge in United States v. Bradstreet, 135 F.3d 46 (1st Cir. 1998); see also United States v. Jeffrey Szur et al., 97 Cr. 108 (JGK); Judge Lowe's charge in United States v. GAF Corporation, 88 Cr. 415 (MJL); and Judge Stanton's charge in United States v. Nicholas Rudi, 95 Cr. 166 (LLS).

That concludes a description of the four objects of Count One of the Indictment. Again, you need not find that the conspirators agreed to accomplish all of these four objects. An agreement to accomplish any one of these objects is sufficient. However, you must all agree on the specific object the conspirators agreed to try to accomplish. On the other hand, if the Government fails to prove that at least one of the objects was an object of the conspiracy, then you must find the defendants not guilty on the conspiracy count.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 8

Count One: Conspiracy -- Second Element --

Membership in the Conspiracy

If you conclude that the Government has proven beyond a reasonable doubt that the conspiracy existed, you must next consider the second question, and that is whether the defendant you are considering participated in that conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

The Government must prove beyond a reasonable doubt by evidence of the actions and conduct of the defendant you are considering that that defendant knowingly and willfully entered into that conspiracy, into that agreement, with a criminal intent, that is, with a purpose to violate the law, and agreed to take part in the conspiracy to further promote and cooperate in its unlawful objectives.

"Unlawfully," "Willfully" and "Knowingly" Defined

I will now define the terms "unlawfully" and "willfully" and "knowingly."

An act is done "knowingly" and "willfully" if it is done deliberately and purposefully; that is, the act of the defendant you are considering must have been the product of his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

"Unlawfully" means simply contrary to law. The defendant you are considering need not have known that he was breaking any particular law or any particular rule. The defendant need only have been aware of the generally unlawful nature of his acts.

Now, knowledge is a matter of inference from the proven facts. Science has not yet devised a manner of looking into a person's mind and knowing what that person is thinking. However, you do have before you the evidence of certain acts and conversations alleged to have taken place with each defendant or in each defendant's presence. The Government contends that these acts and conversations show beyond a reasonable doubt knowledge on the part of each defendant of the unlawful purposes of the conspiracy.

It is not necessary that the defendant you are considering be fully informed as to all the details of the conspiracy to justify an inference of knowledge on that defendant's part. To have guilty knowledge, a defendant need not have known the full extent of the conspiracy or all of its activities or all of its participants. For example, it is not necessary that a defendant know every other member of the conspiracy. In fact, a defendant may know only one other member of the conspiracy and still be a co-conspirator. Nor is it necessary that a defendant receive any monetary benefit from participating in the conspiracy or have a financial stake in the outcome so long as he in fact participated in the conspiracy in the manner I have explained.

The duration and extent of the participation of the defendant you are considering has no bearing on the issue of that defendant's guilt. A defendant need not have joined the conspiracy at the outset. A defendant may have joined it for any purpose at any time in its progress, and the defendant will still be held responsible for all that was done before that defendant joined and all that was done during the conspiracy's existence while the defendant was a member. Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

However, I want to caution you that the mere association by one person with another does not make that person a member of the conspiracy even when coupled with knowledge that a conspiracy is taking place. Mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction. In other words, knowledge without participation is not sufficient. Similarly, the fact that the acts of a defendant, without knowledge of the conspiracy and its unlawful objectives, merely happen to further the purposes or objectives of the conspiracy does not make him a member of the conspiracy. What is necessary is that the defendant you are considering have participated in the conspiracy with knowledge of its unlawful purposes and with an intent to aid in the accomplishment of its unlawful objectives.

In sum, the defendant you are considering, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering an illegal undertaking. The defendant thereby becomes a knowing and willing participant in the unlawful agreement -- that is to say, a conspirator.

A conspiracy, once formed, is presumed to continue until either its objectives are accomplished or there is some affirmative act of termination by its members. So, too, once a person is found to be a member of a conspiracy, that person is presumed to continue being a member in the venture until the venture is terminated, unless it is shown by some affirmative proof that that person withdrew and disassociated himself from it.

Adapted from Judge Jones's charge
in United States v. Weissman,
01 Cr. 529 (BSJ).

REQUEST NO. 9

Count One: Conspiracy -- Third Element -- Overt Acts

The third element is the requirement of an overt act. To sustain its burden of proof with respect to the conspiracy charged in the Indictment, the Government must show beyond a reasonable doubt that at least one overt act was committed in furtherance of that conspiracy by at least one of the co-conspirators -- not necessarily one of the defendants.

The purpose of the overt act requirement is clear. There must have been something more than mere agreement; some overt step or action must have been taken by at least one of the conspirators in furtherance of that conspiracy.

The overt acts are set forth in the Indictment. The Indictment reads as follows:

> [The Court is respectfully requested to read the "Overt Acts" section of Count One of the Indictment.]

You may find that overt acts were committed which were not alleged in the Indictment and that would be sufficient. The only requirement is that one of the members of the conspiracy -- not necessarily the defendant you are considering -- has taken some step or action in furtherance of the conspiracy during the life of that conspiracy.

Let me put it colloquially. The overt act element is a requirement that the agreement went beyond the mere talking stage, the mere agreement stage. The requirement of an overt act is a requirement that some action be taken during the life of the conspiracy by one of the co-conspirators to further that conspiracy.

For the Government to satisfy the overt act requirement, it is not necessary for the Government to prove all of the overt acts alleged in the Indictment. Nor must you find that the defendant you are considering committed the overt acts alleged. It is sufficient for the Government to show that one of the alleged co-conspirators knowingly committed an overt act in furtherance of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the Indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated, as long as it occurred while the conspiracy was still in existence.

You should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an object of the conspiracy.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 10

Count One: Conspiracy -- Time Of Conspiracy

The Indictment charges that the conspiracy set forth in Count One existed from in or about November 2000 through in or about June 2005. It is not essential that the Government prove that the conspiracy started and ended on those specific dates. Indeed, it is sufficient if you find that in fact the charged conspiracy was formed and that it existed for some time within the period set forth in the Indictment, and that at least one overt act was committed in furtherance of the charged conspiracy within that period.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ).

REQUEST NO. 11

Count Two: Securities Fraud --
Statutory and Regulatory Scheme

Count Two charges the defendants ANTHONY CUTI and WILLIAM TENNANT with securities fraud in connection with the purchase and sale of securities issued by Duane Reade. Count Two alleges the following:

> [The Court is respectfully requested to read Count Two of the Indictment.]

The relevant law here is Section 10(b) of the Securities Exchange Act of 1934, Title 15, United States Code, Section 78j(b). Section 10(b) provides, in pertinent part, as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, ... , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Based on its authority under this statute, the SEC has created a number of rules and regulations, one of which, known as Rule 10b-5 is relevant here. Rule 10b-5 reads as follows:

Employment of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Title 15, United States Code, Sections 78j(b) and 78ff; and Title 17, Code of Federal Regulations, Section 240.10b-5.

REQUEST NO. 12

Count Two: Securities Fraud --
Statutory Purpose

The 1934 Securities Exchange Act was the second of two laws passed during the 1930s by Congress to provide a comprehensive plan to protect investors in the purchase and sale of securities that are publicly distributed.

The first legislation was the Securities Act of 1933, which included the creation of the Securities and Exchange Commission. The Securities Act was enacted to protect investors in the purchase of stock that is publicly distributed. The Act provides a comprehensive plan requiring full and fair disclosure of all important facts in connection with the sale of of securities. Such disclosures are designed to enable investors to make realistic appraisals of the merits of securities so that investors can make informed investment decisions.

Following enactment of the Securities Act of 1933, which requires full and fair disclosures relating to the offering of stock to investors, Congress enacted the Securities Exchange Act of 1934, to ensure fair dealing and outlaw deceptive and inequitable practices by those selling or buying securities on the securities exchanges, in over-the-counter markets, or in face-to-face transactions. Among the primary objectives of the Exchange Act are the maintenance of fair and honest security markets and the elimination of manipulative practices that tend to distort the fair and just price of stock.

Adapted from the charge of Judge Sand in United States v. Pignatiello, S1 96 Cr. 1032 (July 14, 1999), and from Sand, Modern Federal Jury Instructions, Instr. 57-20.

REQUEST NO. 13

Count Two: Securities Fraud --
Elements of the Offense

To establish a violation of Section 10(b), the Government must prove each of the following elements beyond a reasonable doubt:

First, that in connection with the purchase or sale of stock or securities issued by Duane Reade, the defendant you are considering did any one or more of the following:

(1) employed a device, scheme or artifice to defraud, or

(2) made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or

(3) engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller;

Second, that the defendant you are considering acted knowingly, willfully, and with the intent to defraud; and

Third, that the defendant you are considering used or caused to be used, any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.

Adapted from Sand, Modern Federal Jury Instructions Instr. 57-21; see United States v. Gleason, 616 F.2d

2 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980).

REQUEST NO. 14

Count Two: First Element -- Fraudulent Act

The first element that the Government must prove beyond a reasonable doubt is that in connection with the purchase or sale of the stock of Duane Reade, the defendant you are considering did any one or more of the following:

(1) employed a device, scheme or artifice to defraud, or

(2) made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or

(3) engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

It is not necessary for the Government to establish all three types of unlawful conduct in connection with the purchase or sale of securities. Any one will be sufficient for a conviction if you so find. However, you must be unanimous as to which type of unlawful conduct was engaged in by the defendant you are considering.

"Device, Scheme, Or Artifice To Defraud"

As I explained earlier in connection with the conspiracy count, a device, scheme or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term which embraces all ingenious efforts and means that individuals devise to take advantage of others. It includes all kinds of manipulative and deceptive acts. The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case.

False Statements And Omissions

A statement, representation, claim, or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made with the intention to deceive. The concealment of material facts in a manner that makes what is said or represented deliberately misleading may also constitute false or fraudulent statements under the statute.

The deception need not be based upon spoken or written words alone. The circumstances in which certain statements are made may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished does not matter.

"In Connection With"

You need not find that the defendant you are considering actually participated in any specific purchase or sale of a security if you find that the defendant participated, or agreed to participate, in fraudulent conduct that was "in connection with" a purchase or sale of securities.

The requirement that the fraudulent conduct be "in connection with" a purchase or sale of securities is satisfied so long as there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if you find that the alleged fraudulent conduct "touched upon" a securities transaction.

It is no defense to an overall scheme to defraud that a defendant was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant you are considering was or would be the actual seller of the securities. It is sufficient if the misrepresentation or omission of material fact involved the purchase or sale of stock.

By the same token, the Government need not prove that the defendant you are considering personally made the misrepresentation or that he omitted the material fact. It is sufficient if the Government establishes that the defendant you are considering caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statements were true or false when made, and, in the case of alleged omissions, whether the omissions were misleading.

"Material Fact"

If you find that the Government has established beyond a reasonable doubt that a statement was false or a statement was omitted rendering the statements that were made misleading, you must next determine whether the statement or omission was material under the circumstances.

The word "material" is used to describe the kind of false statements or omissions that are wrongful under the fraud statutes. A material fact is one that would have been significant to a reasonable investor in making an investment decision. We use the word "material" to distinguish between the kinds of statements we care about and those that are of no real importance.

This is not to say that it is a defense to the crime if the material misrepresentation or omission would not have deceived a person of ordinary intelligence. Once you find that the conspiracy involved the making of material misrepresentations or omissions of material facts, it does not matter whether the intended victims were gullible buyers or sophisticated investors, because the securities laws protect the gullible and unsophisticated as well as the experienced investor.

Nor does it matter whether the alleged unlawful conduct was or would have been successful, or whether the defendant you are considering profited or would have profited as a result of the alleged scheme. Success is not an element of a violation of Section 78j(b) or Rule 10b-5. However, if you find that the defendant you are considering expected to or did profit from the alleged scheme, you may consider that in relation to the element of intent, which I will discuss in a moment.

Adapted from the charge of Judge Jones in United States v. Weissman, 01 Cr. 529 (BSJ); Judge Mukasey in United States v. Goldenberg, 98 Cr. 974 (MBM) (S.D.N.Y. Dec. 20, 1999); and from the charge of Judge Sand in United States v. Pignatiello, S1 96 Cr. 1032 (LBS) (July 14, 1999), and from Sand, Modern Federal Jury Instructions, Instrs. 57-18, 57-22, 57-26.

REQUEST NO. 15

Count Two: Second Element --
Knowledge, Intent and Willfulness

The second element that the Government must establish beyond a reasonable doubt is that the defendant you are considering participated in the scheme to defraud knowingly, willfully and with intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" in the context of the securities laws means to act knowingly and with intent to deceive.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

What is referred to as drawing inferences from circumstantial evidence is no different from what people normally mean when they say, "use your common sense." Using your common sense means that, when you come to decide whether the defendant you are considering possessed or lacked an intent to defraud, you don't limit yourself to what the defendant said, but you also look at what he did and what others did in relation to the defendant and, in general, everything that occurred.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

Under the antifraud statutes, even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

In considering whether or not a defendant acted in good faith, you are instructed that a belief by the defendant, if such belief existed, that ultimately everything would work out so that no investor would lose any money does not require a finding by you that he acted in good faith. No amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors will excuse fraudulent actions or false representations by him.

As a practical matter, then, to sustain the charges against the defendant you are considering, the Government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless, he associated himself with the alleged fraudulent scheme.

To conclude on this element, if you find that a defendant was not a knowing participant in the scheme and lacked the intent to deceive, you must acquit that defendant.

On the other hand, if you find that the Government has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also this second element, that the defendant you are considering was a knowing participant and acted with intent to defraud, and if the Government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict that defendant.

Adapted from Judge Jones's charge in United States v. Weissman, 01 Cr. 529 (BSJ); and Sand, Modern Federal Jury Instructions Instr. 57-25.

REQUEST NO. 16

Count Two: Third Element --
Instrumentality of Interstate Commerce

The third and final element that the Government must prove beyond a reasonable doubt is that the defendant you are considering knowingly used, or caused to be used, the mails or the instrumentalities of interstate commerce in furtherance of the scheme to defraud or fraudulent conduct.

It is not necessary that the defendant you are considering be or would have been directly or personally involved in any use of an instrumentality of interstate commerce. If the conduct alleged would naturally and probably result in the use of an instrumentality of interstate commerce, this element would be satisfied.

Nor is it necessary that the items communicated through an instrumentality of interstate commerce did or would contain the fraudulent material, or anything criminal or objectionable. The matter communicated may be entirely innocent so long as it is in furtherance of the scheme to defraud or fraudulent conduct.

The use of an instrumentality of interstate commerce need not be central to the execution of the scheme or even be incidental to it. All that is required is that the use of the instrumentality of interstate commerce bear some relation to the object of the scheme or fraudulent conduct.

In fact, the actual purchase or sale of a security need not be accompanied by the use of the mails or instrumentality of interstate commerce, so long as the mails or instrumentality of interstate commerce are used in furtherance of the scheme and the defendant is still engaged in actions that are part of a fraudulent scheme when the mails or the instrumentalities of interstate commerce are used.

Adapted from Sand, Modern Federal Jury Instructions Instrs. 57-18, 57-26.

REQUEST NO. 17

Counts Three through Five: False Statements in Financial Statements

Counts Three through Five of the Indictment contain substantive charges against only defendant ANTHONY CUTI. Specifically, those counts charge that ANTHONY CUTI made, or caused to be made, false statements in reports and documents required to be filed under the Securities Exchange Act of 1934. Each of Counts Three through Five charges a different filing in which defendant ANTHONY CUTI either made or caused to be made false statements. Count Three relates to Duane Reade's annual report filed on Form 10-K for the year ending in December 2003; Count Four relates to Duane Reade's quarterly report filed on Form 10-Q for the second quarter of 2004; and Count Five relates to Duane Reade's annual report filed on Form 10-K for the year ending in December 2004.

Counts Three through Five of the Indictment read in pertinent part as follows:

> [The Court is respectfully requested to read Counts Three through Five of the Indictment.]

These counts charge violations of Section 32 of the Securities Exchange Act of 1934, Title 15, United States Code, Section 78ff. Section 78ff provides in relevant part:

> (a) [A]ny person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder . . . which statement was false or

> misleading with respect to any material fact [shall be guilty of a crime].

This section is the general provision of the federal securities laws which makes it unlawful to willfully violate any provision of the Securities Exchange Act of 1934 or any rule or regulation thereunder, by making materially false and misleading statements in applications, reports, and documents required to be filed with the SEC.

REQUEST NO. 18

False Statements in Financial Statements:
Elements Of The Offense

For each of Counts Three through Nine, to establish a violation by ANTHONY CUTI of Title 15, United States Code, Section 78ff, the Government must prove each of the following elements beyond a reasonable doubt:

First, that Duane Reade was required by the Securities Exchange Act of 1934 to file the document charged in that Count; and

Second, that the defendant ANTHONY CUTI knowingly and willfully made, or caused to be made, a materially false or misleading statement in that document.

Now I will explain these two elements in more detail.

REQUEST NO. 19

False Statements in Financial Statements:
First Element -- Required Filings

With respect to each of Counts Three through Five, respectively, the Government must show, first, that Duane Reade was required by the Securities Exchange Act of 1934 to file the document charged in the particular Count. I instruct you that corporations that have publicly traded securities are required to file documents and reports as prescribed by the SEC. These include annual reports on Form 10-K and quarterly reports on Form 10-Q. Thus, if you find that Duane Reade had publicly traded securities, it was required to file these reports.

Title 15, United States Code, Sections 78m(a) and 78o(d); and Title 17, Code of Federal Regulations, Sections 240.13a-1, 13a-13 and 15d-1 and d-13.

REQUEST NO. 20

False Statements in Financial Statements:
Second Element -- Falsity

The Government next must prove, with respect to each of Counts Three through Five, that the defendant ANTHONY CUTI made, or caused to be made, materially false and misleading statements in the financial statement you are considering.

A statement or representation is "false" if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made.

I have defined the term "material" for you previously and you should use that definition here.

Adapted from TSC Industries v. Northway, Inc., 426 U.S. 438, 449-50 (1976); see also Basic, Inc. v. Levinson, 485 U.S. 224 (1988); Sand, Modern Federal Jury Instructions, Instrs. 36-10, 37-15.

To establish this element, the Government need not prove that the defendant himself physically made or otherwise personally prepared the statements in question. It is sufficient if the Government has proved the defendant caused materially false information to be filed by someone.

Adapted from Sand, Modern Federal Jury Instructions, Instr. 36-9.

REQUEST NO. 21

Aiding and Abetting

With respect to each of the substantive counts described above, there are two other ways the Government may establish guilt. One way is called "aiding and abetting," and the other is called "willfully causing a crime." That is, in Count Two, the defendants ANTHONY CUTI and WILLIAM TENNANT are both charged not only as a principal who committed the crime, but also as an aider and abettor or with having willfully caused the crime. Similarly, in Counts Three through Five, ANTHONY CUTI is charged not only as a principal who committed the crimes, but also as an aider and abettor or with having willfully caused each crime. The aiding and abetting statute, Title 18, United States Code, Section 2, reads, in part, as follows:

> Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the Government to show that a defendant himself physically committed the crime with which the defendant is charged in order for you to find that defendant guilty. Thus, if you do not find beyond a reasonable doubt that the defendant you are considering himself committed the crime charged, you may, under certain circumstances, still find that defendant guilty of that crime as an aider or abettor.

A person who aids or abets another to commit an offense is just as guilty of that offense as if the defendant committed it himself. Accordingly, you may find a defendant guilty of the substantive crime if you find beyond a reasonable doubt that the Government has proved that another person actually committed the crime, and that the defendant you are considering aided and abetted that person in the commission of the offense.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant you are considering aided or abetted the commission of the crime.

To aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that the defendant willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by that defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether the defendant you are considering aided or abetted the commission of the crime with which that defendant is charged, ask yourself these questions:

-- Did the defendant participate in the crime charged as something the defendant wished to bring about?

-- Did the defendant associate himself with the criminal venture knowingly and willfully?

-- Did the defendant seek by his actions to make the criminal venture succeed?

If the defendant did, then that defendant is an aider and abettor, and therefore guilty as an aider and abettor of the offense. If the defendant did not, then that defendant is not an aider and abettor, and is not guilty as an aider and abettor of that offense.

Adapted from Sand, Modern Federal Jury Instructions, Instrs. 11-1 and 11-2, and from the charge approved in United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977). See United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990) (discussing requirements of aiding and abetting liability); United States v. Clemente, 640 F.2d 1069 (2d Cir.) (same), cert. denied, 454 U.S. 820 (1981).

REQUEST NO. 22

Willfully Causing a Crime

The other potential means for establishing the guilt of either ANTHONY CUTI or WILLIAM TENNANT on Count Two and ANTHONY CUTI on Counts Three, Four and Five is through a finding beyond a reasonable doubt that the defendant you are considering willfully caused a crime. Section 2(b) of the aiding and abetting statute, which relates to willfully causing a crime, reads as follows:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States [shall be guilty of a federal crime].

What does the term "willfully caused" mean? It means that the defendant you are considering himself need not have physically committed the crime or supervised or participated in the actual criminal conduct charged in the Indictment.

The meaning of the term "willfully caused" can be found in the answers to the following questions:

First, did the defendant take some action without which the crime would not have occurred?

Second, did the defendant intend that the crime would be actually committed by others?

If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes" then the defendant you are considering is guilty of the crime charged just as if the defendant himself had actually committed it.

Adapted from Sand, Modern Federal Jury Instructions, Instr. 11-3. See Untied States v. Concepcion, 983 F.2d 369, 383-84 (2d Cir. 1992); United States v. Sliker, 751 F.2d 477, 494 (2d Cir. 1984); United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982); United States v. Gleason, 616 F.2d 2 (2d Cir. 1979); United States v. Kelner, 534 F.2d 1020, 1022-23 (2d Cir. 1976).

Request No. 23

Conscious Avoidance

[If Applicable]

As I have explained, each of the counts charged in the Indictment requires the Government to prove that the defendant charged with that crime acted knowingly and intentionally.

In determining whether a defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what otherwise would have been obvious.

I would like to point out that the necessary knowledge on the part of the defendant with respect to each of the charges cannot be established by showing that the defendant was careless, negligent, or foolish. However, one may not willfully and intentionally remain ignorant of a fact important to his conduct in order to escape the consequences of criminal law.

Thus, if you find beyond a reasonable doubt that the defendant you are considering was aware that there was a high probability that because of his conduct Duane Reade’s reported financial results were false or misleading, but that the defendant deliberately and consciously avoided confirming this fact, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge, unless you find that the defendant actually believed that his conduct did not cause the reported financial results to be false or misleading. In other words, a defendant cannot avoid criminal responsibility for his own conduct by "deliberately closing his eyes," or remaining purposefully ignorant of facts which would confirm to him that he was engaged in criminal conduct.

> Adapted from the charge in United States v. Mang Sun Wong, 884 F.2d 1537, 1541-43 (2d Cir. 1989) (expressly approving charge), cert. denied, 493 U.S. 1082 (1990), and from Sand, Modern Federal Jury Instructions, Instr. 44-5 (mail and wire fraud). See also United States v. Aina-Marshall, 336 F.3d 167, 170 (2d Cir. 2003) ("a conscious avoidance instruction may be given only (i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, ... and (ii) the appropriate factual predicate for the charge exists, i.e., the evidence is such that a rational juror may reach the conclusion "beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact"); see also United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000) ("A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact").

REQUEST NO. 24

Venue

Now, in addition to dealing with the elements of each of the offenses, you must also consider the issue of venue as to each offense, namely, whether any act in furtherance of the unlawful activity occurred within the Southern District of New York. The Southern District of New York encompasses Manhattan, the Bronx, Westchester, Rockland, Putnam, Dutchess, Orange and Sullivan County, so anything that occurs in those counties occurs in the Southern District of New York. It is sufficient to satisfy the venue requirement if any act by anyone in furtherance of the crime charged occurred within the Southern District of New York.

REQUEST NO. 25

Accomplice Testimony

You have heard witnesses who testified that they were actually involved in carrying out aspects of the crimes charged in the Indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them.

Experience will tell you that the Government frequently must rely on the testimony of witnesses who admit participating in the alleged crimes at issue. The Government must take its witnesses as it finds them and frequently must use such testimony in a criminal prosecution because otherwise it would be difficult or impossible to detect and prosecute wrongdoers.

The testimony of such accomplices is therefore properly considered by the jury. Indeed, it is the law in federal courts that the testimony of an accomplice may be enough in itself for conviction, if the jury believes that the testimony establishes guilt beyond a reasonable doubt.

However, because of the possible interest an accomplice may have in testifying, the accomplice's testimony should be scrutinized with special care and caution. The fact that a witness is an accomplice can be considered by you as bearing upon his credibility. However, it does not follow that simply because a person has admitted to participating in one or more crimes, that he is incapable of giving a truthful version of what happened.

Like the testimony of any other witness, accomplice witness testimony should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness's demeanor, candor, the strength and accuracy of a witness's recollection, his background, and the extent to which his testimony is or is not corroborated by other evidence in the case.

You may consider whether the accomplice witnesses -- like any other witness called in this case -- has an interest in the outcome of the case, and if so, whether it has affected his testimony.

In evaluating the testimony of an accomplice witness, you should ask yourselves whether this accomplice would benefit more by lying, or by telling the truth. Was his testimony made up in any way because he believed or hoped that he would somehow receive favorable treatment by testifying falsely? Or did he believe that his interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony?

If you find that the testimony was false, you should reject it. However, if, after a cautious and careful examination of the accomplice witness's testimony and demeanor upon the witness stand, you are satisfied that the witness told the truth, you should accept it as credible and act upon it accordingly.

As with any witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept his testimony in other parts, or may disregard all of it. That is a determination entirely for you, the jury.

Adapted from Sand, Modern Federal Jury Instructions, Instr. 7-5; from the charge of Judge Keenan in United States v. Carrero, 91 Cr. 365 (S.D.N.Y. 1991); and from the charge in United States v. Projansky, 465 F.2d 123, 136-37 fn. 25 (2d Cir.) (specifically approving charge set forth in footnote), cert. denied, 409 U.S. 1006 (1972). See United States v. Gleason, 616 F.2d 2, 15 (2d Cir. 1979) ("Where the court points out that testimony of certain types of witnesses may be suspect and should therefore be scrutinized and weighed with care, such as that of accomplices or coconspirators . . . it must also direct the jury's attention to the fact that it may well find these witnesses to be truthful, in whole or in part.") (citations omitted), cert. denied, 444 U.S. 1082 (1980), and United States v. Cheung Kin Ping, 555 F.2d 1069, 1073 (2d Cir. 1977) (same). See also United States v. Swiderski, 539 F.2d 854, 860 (2d Cir. 1976) (can be reversible error not to give accomplice witness charge if requested by defense).

REQUEST NO. 26

Accomplice Testimony -- Guilty Plea

You have heard testimony from a Government witness who pleaded guilty to charges arising out of the same facts as this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendants on trial from the fact that a prosecution witness pled guilty to similar charges. Each witness's decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants on trial here.

United States v. Ramirez, 973 F.2d 102, 104-06 (2d Cir. 1992) (specifically approving charge and holding that it is reversible error not to give such a charge if requested, unless there is no significant prejudice to defendant).

REQUEST NO. 27

Character Testimony

[If applicable]

You have heard testimony that the defendant [ANTHONY CUTI and/or WILLIAM TENNANT] has a good reputation for honesty in the community where he lives and works and for truthfulness.

Along with all the other evidence you have heard, you may take into consideration what you believe about the defendant's honesty and truthfulness when you decide whether the Government has proven, beyond a reasonable doubt, that the defendant committed the crime.

Adapted from the charge in United States v. Pujana-Mena, 949 F.2d 24, 27-31 (2d Cir. 1991) (specifically approving charge).

REQUEST NO. 28

Defendant's Testimony

[Requested only if defendant testifies]

The defendant [ANTHONY CUTI and/or WILLIAM TENNANT] testified at trial. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case.

Adapted from United States v. Prince Gaines, 457 F.3d 238 (2d Cir. 2006); and from the charge of the Honorable Denise L. Cote, United States v. Borbon, et al., 05 Cr. 909, September 25, 2006.

REQUEST NO. 29
Defendant's Right Not to Testify

[If requested by defense.]

The defendant [ANTHONY CUTI and/or WILLIAM TENNANT] did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the Government's burden to prove a defendant guilty beyond a reasonable doubt. That burden remains with the Government throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he or she is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

Sand, Modern Federal Jury Instructions, Instr. 5-21.

REQUEST NO. 30

Evidence Of Other Crimes, Wrongs or Acts

[If applicable]

There has been evidence received during the trial that [ANTHONY CUTI and/or WILLIAM TENNANT] allegedly engaged in other crimes, wrongs or acts. Let me remind you that the defendant is only on trial for committing the acts alleged in the Indictment. Accordingly, you may not consider this evidence of other alleged crimes, wrongs or acts as a substitute for proof that the defendant committed the crimes charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. This other evidence was admitted for a more limited purpose, namely, as potential evidence of the defendant's motive, opportunity, intent, knowledge, plan, and absence of mistake, and to provide background for the alleged conspiracy, and you may consider it for those purposes only. It may not be considered by you for any other purpose. Specifically, you may not consider it as evidence that the defendant is of bad character or has a propensity to commit crimes.

Sand, Modern Federal Jury Instructions, Instrs. 5-25, 5-26.

REQUEST NO. 31

Uncalled Witness -- Equally Available to Both Sides

[If applicable]

Both the Government and the defendant have the same power to subpoena witnesses to testify on their behalf. If a potential witness could have been called by the Government or by a defendant and neither called the witness, then you may draw the conclusion that the testimony of the absent witness might have been unfavorable to the Government or to the defendant or to both.

On the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness.

You should remember that there is no duty on either side to call a witness whose testimony would be merely cumulative of testimony already in evidence, or who would merely provide additional testimony to facts already in evidence.

Adapted from the charge of Judge Conboy in United States v. Lew, 91 Cr. 361 (KC) (S.D.N.Y. 1991) and from Sand, Modern Federal Jury Instructions, Instr. 6-7. See generally United States v. Erb, 543 F.2d 438, 444 (2d Cir. 1976) (discussing propriety of missing witness charges).

"[W]hen a witness is equally available to both sides, 'the failure to produce is open to an inference against both parties.' No instruction is necessary where the unpresented testimony would be merely cumulative." United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988) (citations omitted) (emphasis in original). See also United States v. Nichols, 912 F.2d 598, 601 (2d Cir. 1990) (whether to give charge is committed to discretion of trial judge; generally discussing applicable standards).

REQUEST NO. 32

Particular Investigative Techniques Not Required

[If Applicable]

You have heard reference, in the arguments of defense counsel in this case, to the fact that certain investigative techniques were not used by the Government. There is no legal requirement, however, that the Government prove its case through any particular means. While you are to carefully consider the evidence adduced by the Government, you are not to speculate as to why they used the techniques they did or why they did not use other techniques. The Government is not on trial. Law enforcement techniques are not your concern. Your concern is to determine whether or not, on the evidence or lack of evidence, the defendant's guilt has been proved beyond a reasonable doubt.

Adapted from the charge of Judge Leval in United States v. Mucciante, 91 Cr. 403 (PNL) (S.D.N.Y. 1992), and from the charge of Judge Keenan in United States v. Medina, 91 Cr. 894 (JFK) (S.D.N.Y. 1992).

REQUEST NO. 33

Persons Not On Trial

You may not draw any inference, favorable or unfavorable, towards the Government or the defendants on trial from the fact that any person in addition to the defendants is not on trial here. You also may not speculate as to the reasons why other persons are not on trial. Those matters are wholly outside your concern and have no bearing on your function as jurors.

Adapted from Judge Werker's charge
in United States v. Barnes, et al.,
S 77 Cr. 190 (Nov. 29, 1977).

REQUEST NO. 34

Preparation Of Witnesses

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court.

Although you may consider that fact when you are evaluating a witness's credibility, I should tell you that there is nothing either unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he will be questioned about, focus on those subjects and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Again, the weight you give to the fact or the nature of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

Charge of Hon. Michael B. Mukasey in United States v. Abdul Latif Abdul Salam, 98 Cr. 208 (MBM) (S.D.N.Y. 1999).

REQUEST NO. 35

Multiple Counts

The Indictment contains a total of five counts. ANTHONY CUTI is charged in all five counts; WILLIAM TENNANT is charged in Counts One and Two. Each of the five counts charges a different crime. You must, as a matter of law, consider each count of the Indictment and each defendant's involvement in that count separately, and you must return a separate verdict for each count and each defendant.

Adapted from Sand et al., Modern Federal Jury Instructions, Instrs. 3-5, 3-8.

REQUEST NO. 36

Stipulations

[If Applicable]

In this case you have heard evidence in the form of stipulations.

A stipulation of fact is an agreement among the parties that a certain fact is true. You must accept as true the fact as to which the parties have stipulated.

Adapted from the charge of Judge Pierre N. Leval in United States v. Mucciante, 91 Cr. 403 (PNL) (S.D.N.Y. 1992) and from Sand et al., Modern Federal Jury Instructions, Instr. 5-6 & 5-7.

REQUEST NO. 37

Conclusion

Your function now is to weigh the evidence in this case and to determine the guilt or innocence of each defendant with respect to each count of the Indictment.

You must base your verdict solely on the basis of the evidence and these instructions as to the law, and you are obliged on your oath as jurors to follow the law as I instruct you, whether you agree or disagree with the particular law in question.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, however, to consult with one another, and to deliberate with a view to reaching an agreement, if you can possibly do so without violence to individual judgment. Each of you must decide the case for him or herself, but do so only after an impartial discussion and consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change an opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors.

Remember at all times, you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

If you are divided, do not report how the vote stands and if you have reached a verdict do not report what it is until you are asked in open court.

In conclusion, Ladies and Gentlemen, I am sure that if you listen to the views of your fellow jurors and if you apply your own common sense you will reach a fair verdict here.

Remember that your verdict must be rendered without fear, without favor, and without prejudice or sympathy.

Adapted from the charge of Judge Bauman in United States v. Soldaro, 73 Cr. 167, Tr. at 2502-03 (S.D.N.Y. 1973). See also United States v. Corr, 75 Cr. 803, Tr. 5425-26 (S.D.N.Y.), aff'd, 543 F.2d 1042 (2d Cir. 1970).

Dated: New York, New York
February 22, 2010

Respectfully submitted,

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